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No. 1287

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In the
Supreme Court of the United States

October Term, 1970

JULIUS GREEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

October Term, 1970

No.

JULIUS GRIECO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Julius Grieco, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit for the above entitled case, dated November 2, 1970, affirmed the District Court's denial of a motion filed by the petitioner pursuant to 28 U.S.C. §2255. The opinion and judgment of the Court of Appeals is reprinted as Appendix "A" *infra*.

JURISDICTION

The judgment of the court was entered on November 2, 1970. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). This petition is filed within ninety days from the date of the entry of said judgment, pursuant to the provisions of Title 28 U.S.C. §2101(c).

QUESTION PRESENTED

Whether under the rule of *Kaufman* v. *United States*, 394 U.S. 217 (1969) the petitioner in a proceeding under 28 U.S.C. §2255 may be precluded from raising the issue of the admissibility of statements when there was no objection to their admission at petitioner's trial?

STATEMENT OF THE CASE

The petitioner, Grieco, was convicted, with others, of conspiracy to use the mails in a scheme to defraud and of unlawfully causing the transportation in interstate commerce of forged or falsely altered securities. On appeal to this Court, his conviction was affirmed 299 F.2d 511 (1962) and certiorari was denied. 370 U.S. 935.

The petitioner, pursuant to 28 U.S.C. §2255 filed a petition seeking to vacate the judgment of conviction and sentence. The United States filed a motion to dismiss and the District Court granted the motion to dismiss

and filed its Memorandum. (App. 13)[1] The Court of Appeals affirmed (Appendix A, *infra*)

The evidence introduced against the petitioner was largely circumstantial. In an attempt to bolster its circumstantial case against the petitioner the government introduced certain statements made by the petitioner to agents of the F.B.I. The government's proof as to the petitioner is fully set forth in the opinion of the Court of Appeals on direct appeal. 289 F.2d 511, 513-514, 515.

CONSPIRACY[2]

"There is ample proof of the unlawful scheme in detail: Cab drivers would seek out nightlife-bound visitors in Chicago and drive them to the Show Lounge. There they would be drawn into the net of an unlawful scheme by companionable female employees of the Lounge. The unlawful aim of these companions was to exhaust the cash reserves of the victims and aid in inducing, as quickly as possible, drunkenness by means of frequent or spiked drinks. Once out of cash, the victims were induced to sign checks already "made." Once written, the checks were used as models for tracing forged copies. The copies were then used in various ruses to induce the writing of additional or substitute checks. First endorsements were generally fictitious to give the appearance of genuineness and to conceal the culprits. The checks were negotiated to persons like Grieco, and institutions like the 24-hour Shopping

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[1] References to (App. are to the Appendix filed in the Court of Appeals which has been certified to this Court as part of the Record in this cause.

[2] Captions CONSPIRACY and SUBSTANTIVE COUNTS are inserted by the writer of this Petition for the convenience of the Court.

Center, having bank accounts. The checks were deposited in the accounts and thus placed in channels which led to the mails and eventually to the drawee banks in Illinois and other states.

"LoCelso was a cab driver; Grieco owner of the 24-hour Shopping Center, whose bank account and his own were at the Merchants National Bank in Chicago; Abbrescia was manager of the Lounge and Doran his assistant.

• • •

"The evidence and inferences favorable to the Government, *United States* v. *Green*, 7 Cir., 246 F.2d 155, 157 *cert. denied*, 355 U.S. 871, 78 S.Ct. 122, 2 L.Ed. 2d 76 (1957), in proof of defendants' participation in the conspiracy are: LoCelso was one of the cab drivers who brought victims to the Show Lounge. He shared in the division of a percentage of the proceeds of the unlawful conspiracy. He would "half drag and half stagger" the victims to a cab for return to their hotel or "some place." He drove victim McDonald to the Show Lounge, presented him to Abbrescia, and McDonald was defrauded. He also drove victim Siehl to the Lounge and later to a brothel. He received a "gratuity" from Siehl of a $350 check which he deposited with a cab company credit union and later withdrew.

"Also: Grieco owned the 24-hour Shopping Center and the Show Lounge. The first fraudulent check taken was of victim Bardin, dated September 21, 1956, drawn on a North Carolina bank. It was endorsed by Shopping Center and deposited in its account with Merchants National Bank of Chicago, where Grieco also had his personal account No. 20284. The check was not paid by the drawee and was returned "Payment Refused Amount Altered." Merchants National debited Shopping Center's account accordingly and notified it of the dishonor of the Bardin check.

"And: Subsequently, victim Wyman's check, dated December 4, 1956, subject of Count One, was taken. It was 'made" in printing similar to Doran's and drawn against

the Goodwine State Bank of Potomac, Illinois. It bears the endorsements 'Jack Johnson; Shopping Center; J. Grieco, 2946 W. Madison; Merchants,' Grieco wrote his endorsement. The check was received by the Goodwine bank and returned dishonored. It had not been put through a 'bad check' detecting device that Shopping Center had had installed which photographs checks and presenters of checks. The device was installed under a contract indemnifying Shopping Center against loss from 'bad checks.' The contract required all Shopping Center's checks to be processed.

"The jury could reasonably conclude from the evidence and inferences in the record that Abbrescia and LoCelso were members of the unlawful scheme of which Wyman was a victim: and that Doran 'made' the fraudulent Wyman check and that the first endorser was fictitious.

"Once shown to be a part of the conspiracy, Grieco is responsible "for all that may be or has been done." *Poliafico* v. *United States*, 6 Cir., 237 F.2d 97, 104, *cert. denied*, 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed.2d 597 (1956). His participation need not have been shown by direct evidence. *Ibid.* Since a check drawn on a New Jersey bank was returned dishonored in eighteen days, the jury could reasonably infer that the Bardin check was returned from the North Carolina bank, and Shopping Center notified, within the eighty-one days before the Wyman check was written. And it could conclude that Grieco, as owner of the Shopping Center, knew of notice of the returned Bardin check and with that guilty knowledge endorsed the Wyman check.

SUBSTANTIVE COUNTS

"There is evidence from which the jury could reasonably infer that Doran printed the Bynum check, Exhibit 39. It bears the endorsements 'Dominick Abbrescia' and 'J.

Grieco 29284.' It also bears the endorsements of the Merchants National Bank and Federal Reserve Bank of Chicago. There is evidence of fingerprints and comparisons of handwriting from which the jury could reasonably infer that Abbrescia wrote his endorsement, and from comparison of handwriting that Grieco wrote his. There is evidence from which the jury could reasonably infer that Abbrescia, Dornn and Grieco caused the check to be transported from Chicago, Illinois to Hudson, Ohio.

"It was against this factual background that the government introduced the testimony of Special Agent Jossy of the Federal Bureau of Investigation, that he had questioned the petitioner in regard to certain checks, which had been forged in Chicago. He stated that the petitioner admitted that he had cashed the checks, but he did not know the individual who brought them to him for cashing and he did not know the endorser. (App. 1-4). The government also introduced the testimony of Special Agent Arthur F. Nehrbass of the Federal Bureau of Investigation, that he had questioned the petitioner and that the petitioner admitted that he had cashed checks for his co-defendant and when shown other checks, which were the subject of the investigation that he admitted that any check bearing the name Grieco was personally accepted by him (App. 5-7).

"Although both agents of the Federal Bureau of Investigation were conducting an investigation, which led to the return of the indictment against the petitioner, neither agent advised the petitioner, in any way, that he was a possible defendant or had they advised him of his rights under the 5th Amendment to the Constitution.

"The defendant objected to both these statements when made (App. 3, 4, 6, 11, & 12), however, there was no motion to suppress.

REASON FOR GRANTING THE WRIT

The Court of Appeals limited the application of this Court's decision in Kaufman v. United States and this Court should grant certiorari to consider the application of Kaufman.

The District Court, in its memorandum, stated, as one of its reasons for dismissing the petition, stated:

> "However, even assuming that the petitioner's conversations with the two F.B.I. agents were confessions, the record indicates their admission into evidence was not objected to, and cannot now be raised as error." (App. 14)

The Court of Appeals followed this reasoning and stated (Appendix A, *infra*):

> "Petitioner attempts to avoid the necessity of objecting or moving to suppress his statements by referring to *Kaufman* v. *United States*, 394 U.S. 217 (1969). That case stands for the proposition that post-conviction relief under section 2255 is available to protect constitutional rights in a criminal proceeding and that federal prisoners are not necessarily confined to direct appeals in vindicating those rights. But it does not support petitioner's broad claim that he was relieved of objecting to the admission of the statements on the basis of voluntariness. Indeed, the Supreme Court in *Kaufman* declared that a court entertaining a section 2255 petition 'may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal.' 394 U.S. at 227 n. 8."

There is simply nothing in the record to even remotely suggest that the petitioner "deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal. Indeed petitioner has been incarcerated since this Court denied certiorari.

Prior to *Kaufman* v. *United States*, 394 U.S. 217, there was a conflict in the Circuits as to whether such a claim could furnish a basis for relief in proceedings pursuant to 28 U.S.C. §2255. It was certainly clear that state prisoners could raise such claims in habeas corpus proceedings. *Mancusi* v. *DeForte*, 392 U.S. 364, *Carafas* v. *LaVallee*, 391 U.S. 234, *Warden* v. *Hayden*, 387 U.S. 443.

However, that question is now resolved, for this Court in *Kaufman* expressly held that such claims are recognizable. In so doing, this Court adopted the dissent of Judge Wright in *Thornton* v. *United States*, 368 F.2d 822.

Judge Wright stated, at page 831

> "There is undoubtedly a difference in the way federal courts should treat post-conviction applications by state and federal prisoners. Brown v. Allen, *supra*, 344 U.S. 443 at 508, 73 S.Ct. 397, 97 L.Ed. 469 (opinion of Mr. Justice Frankfurter), interprets 28 U.S.C. § 2241 as requiring federal courts to have the 'last say' with respect to questions of federal law. Federal prisoners applying for collateral relief often have had their constitutional claims passed on by federal courts at trial or on appeal, so the Brown v. Allen rationale for federal court relitigation is inapposite. But this difference provides no basis for limiting the grounds upon which federal prisoners may obtain collateral relief, or for formulating a separate set of rules to determine when a federal prisoner's claim has adequately been adjudicated. Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it

> is unclear whether the 'say' was on the merits? What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not full and fair' within the meaning of Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)? All these problems are common to state and federal prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded. It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications."

Therefore we submit that such claims are clearly cognizable in proceedings pursuant to 28 U.S.C. §2255.

The statements made by the petitioner that he had accepted, cashed, and endorsed the checks (App. 4, 6) were highly incriminatory, as was the false exculpatory statement that he did not know the person who cashed the checks. Exculpatory statements made by a defendant, when shown to be false, are "circumstantial evidence of guilty consciousness and have independent probative force" *United States* v. *Smolin*, 182 F.2d 782, 785-86 (2nd Cir. 1950). See also *United States* v. *Farina*, 218 F.2d 62, 63 (2nd Cir. 1954), *United States* v. *Simone*, 205 F.2d 480, 483 (2nd Cir. 1953).

The District Court and the Court of Appeals held that since the trial of the petitioner commenced prior to *Miranda* v. *Arizona*, 384 U.S. 436 and *Escobedo* v. *Illinois*, 378 U.S. 478 and since neither decision is to be applied retro-

actively, *Johnson* v. *New Jersey*, 384 U.S. 719, that the petitioner's claim was not cognizable.

We submit that such a disposition misconceives the thrust of petitioner's argument and this Court's opinion in *Kaufman*.

In *Miranda* v. *Arizona* this Court prescribed standard of police conduct by which safeguards of the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel interweave to protect an individual from the inherently coercive nature of police interrogation. The *Miranda* Court imposed a duty on police officers to advise an accused of his right to remain silent and of his right to counsel. Furthermore, notwithstanding the warnings, if a statement is elicited from an accused without the presence of counsel, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." As a result, the burden to establish a waiver of constitutional safeguards is squarely on the government.

We, of course, recognize that *Miranda* is not retroactive. However, it has been clearly held that compliance or noncompliance with the *Miranda* standards is a factor to be considered in determining voluntariness. In *Davis* v. *North Carolina*, 384 U.S. 737 at page 713-714 the Court stated,

> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made.

This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. Haynes v. State of Washington, 373 U.S. 503, 510-511, 83 S.Ct. 1336, 1341-1342, 10 L.Ed.2d 513 (1963); Culombe v. Connecticut, 367 U.S. 568, 610, 81 S.Ct. 1860, 1883, 6 L.Ed. 2d 1037 (1961); Turner v. Commonwealth of Pennsylvania, 338 U.S. 62, 64, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949). See also Gallegos v. State of Colorado, 370 U.S. 49, 54, 55, 82 S.Ct. 1209, 1212, 1213, 8 L.Ed.2d 325 (1962). Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

Therefore, since it is required by *Jackson* v. *Denno*, 378 U.S. 368 that a hearing be held outside the presence of the jury to determine the voluntary nature of a statement and since it affirmatively appears from the testimony of the F.B.I. agents that no warnings whatsoever were given to the petitioner we respectfully submit that the District Court erred in dismissing the petition and that the opinion of the Court of Appeals affirming that decision requires a grant of certiorari to consider this important question.

CONCLUSION

Wherefore, for the foregoing reasons we respectfully request that this Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 17818
JULIUS J. GRIECO,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NOVEMBER 4, 1970

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and KILEY, *Circuit Judge*.

SWYGERT, *Chief Judge*. This is an appeal from the denial of a petition filed pursuant to 28 U.S.C. § 2255 in which Julius J. Grieco asked the district court to vacate his sentence and conviction. Petitioner was convicted of conspiracy to use the mails in a scheme to defraud and of unlawfully causing the transportation in interstate commerce of forged or falsely altered securi-

ties. On appeal this court affirmed the conviction, 299 F.2d 511, and certiorari was denied, 370 U.S. 925 (1962). The Government's proof is fully set forth in the opinion of this court in that appeal.

At trial two Federal Bureau of Investigation agents testified about certain incriminatory oral admissions made to them by petitioner during the investigation which led to his indictment. According to petitioner, neither agent advised him that he was a possible defendant or of his fifth amendment rights against self-incrimination. Although petitioner objected to the admission of the statements on the ground of relevancy, he did not question their voluntariness or move to suppress them.

Since the interviews in question were conducted prior to the decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and further since the holding in that case may not be applied retroactively, *Johnson* v. *New Jersey*, 384 U.S. 719 (1936), petitioner concedes that *Miranda* is not applicable. Nonetheless, he argues that the failure to give *Miranda* warnings in cases predating that decision is a significant factor in determining the voluntariness of incriminatory statements, citing *Davis* v. *North Carolina*, 384 U.S. 737 (1966). His position is that the absence of such warnings made the voluntary nature of his statements suspect and, therefore, pursuant to *Jackson* v. *Denno*, 378 U.S. 368 (1964), a preliminary hearing out of the presence of the jury was required before petitioner's admissions could be admitted into evidence.

Ordinarily, petitioner's failure to object to the admission of the statements on the basis of voluntariness would foreclose his contention that he should have been afforded a voir dire hearing to determine voluntariness. This is especially true where, as here, the circumstances of the

interrogation make clear that there could have been no indicia of involuntariness available to flag the issue other than some minimal assertion by petitioner that the admissions were not fully voluntary, and the opportunity to pose the question of voluntariness has been previously ignored by petitioner at trial, in this court, and in the Supreme Court. Unless special circumstances exist, the trial court is not obliged sua sponte to conduct a voluntariness hearing. *United States* v. *Reid*, 410 F.2d 1223, 1228 (7th Cir. 1969); *United States* v. *Taylor*, 374 F.2d 753, 756 (7th Cir. 1967).

Petitioner attempts to avoid the necessity of objecting or moving to suppress his statements by referring to *Kaufman* v. *United States*, 394 U.S. 217 (1969). That case stands for the proposition that post-conviction relief under section 2255 is available to protect constitutional rights in a criminal proceeding and that federal prisoners are not necessarily confined to direct appeals in vindicating those rights. But it does not support petitioner's broad claim that he was relieved of objecting to the admission of the statements on the basis of voluntariness. Indeed, the Supreme Court in *Kaufman* declared that a court entertaining a section 2255 petition "may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal." 394 U.S. at 227 n. 8.

In ruling on the petition, the district judge specifically found that the record is barren of any evidence of coercion or that the petitioner was "under any pressure of unrelenting interrogation." Petitioner does not challenge this determination. Indeed, he makes no claim of involuntariness save the absence of warnings that are now re-

quired by *Miranda*. And on that score, the record shows that the interviews were conducted in a noncustodial setting, thereby rendering the warnings unnecessary even if *Miranda* were applicable. In these circumstances, petitioner's claim of involuntariness is not of the order to bring it within the ambit of *Kaufman* and thereby excuse his failure to object to the admission of the statements or move to suppress.

Petitioner should not at this late date be permitted to assert a claim of involuntariness on the basis he now alleges when there is no showing that he was prevented from making that assertion during the trial or on appeal. Simply because later Supreme Court decisions may, at best, lend a colorable basis for questioning the voluntariness of petitioner's statements does not require us to hold that the trial judge should have been clairvoyant and anticipated the holdings in those cases.

The denial of the petition is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.